IN THE

# Supreme Court

OF THE UNITED STATES.

OCTOBER TERM A. D., 1902.

| | |
|---|---|
| THE DIAMOND GLUE COMPANY, *Plaintiff in Error.* vs. THE UNITED STATES GLUE COAMPANY, *Defendant in Error.* | In Error to the Circuit Court of the United States for the Eastern District of Wisconsin. |

## REPLY FOR PLAINTIFF IN ERROR.

Whether it was intended or not, the briefs filed on behalf of the defendant in error avoid any discussion of the questions as presented in the brief for the plaintiff in error. The errors relied upon were there urged separately, and challenged direct answers. But counsel first attempt to shift the ground on which the lower court based its peremptory instruction, and then to sustain the court's action by a claim that the plaintiff and not the defendant was guilty of the breach of the contract.

It will suffice in this reply briefly to indicate these departures, and to bring back the discussion to the issues presented, the questions actually involved in this hearing.

## CONCERNING THE FACTS.

The contract sued upon, having been made before the Wisconsin statute was in force, is conceded to be valid. But its performance by plaintiff in error was, it is said, made illegal by that statute. Counsel ignore the essential character of that performance as shown by the proof, and base their argument upon the wording of the contract. They do not deny that the very acts, which they claim were a doing of business in Wisconsin, are shown by the evidence not to have been done—their appeal to the original complaint confesses this—; nor that it was the clear intention of the parties that so far as the operation of the factory was concerned, the defendant should be—as it was in fact—the sole judge of the extent of such services. The contract is that the plaintiff shall have the management and shall operate, and furnish a superintendent (paid by the defendant) "and give such personal supervision as may be necessary from time in the operation of the same." (Pr. Rec., p. 76)). This personal supervision was a specific statement of what was meant, by management and operation; otherwise it has no meaning. This interpretation is confirmed by the conduct of the parties. If the contract gave the defendant the right to demand personal supervision and control of the factory by the plaintiff, it also gave it the right to limit the extent of such supervision and control, or to exclude plaintiff altogether.

In all the correspondence relating to the termination of this contract, defendant never referred to any services due from, or being rendered by, the plaintiff, *except the selling of the product of the factory.* Beginning November 20th, 1899, the United States Glue Company thus referred to the service required of the plaintiff under the contract. (Rec. p. 96):

"We have no such [more advantageous] agreement in view, although, of course if *we are to continue to manufacture*, and our relations with you are terminated, we shall be obliged to make new arrangements, not necessarily new connections, *in order to put goods upon the market.*" * * * "Your agreement is to sell our product."

And on November 28 (Rec. p. 99): "The termination of your *arrangement for handling our product* has been before us both."

And on December 2nd. (Ex. 34, Rec. p. 100): "As we wrote you on the 28th ult., we wished you *to desist from making any further sales* as representing us * * * *as* * * * *the agreement* * * * *is at an end.*"

And when on December 5th, 1899 the plaintiff asked defendant to name the "various breaches" referred to in defendant's letter of the preceding day, the request was ignored, and the only answer was: "our action is, in our judgment, based on good and sufficient legal grounds." (Exh. 35, 36 and 37, Rec. pp. 101–102).

When the contract was thus arbitrarily terminated the plaintiff had neither a single employee nor any property in the State of Wisconsin (Rec. p. 45); it merely ceased to sell the product of the Wisconsin factory from its Chicago office. Hardin was then superintendent at the factory, the paid employee of the defendant, and he so continued. Morehead who was first sent by the plaintiff, was succeeded by Hardin in September, 1899, and thereupon resumed his employment with the Diamond Glue Company, and was its general superintendent at the time of the trial. Neither was at any time an employee of both companies.

In view of these facts counsel's failure to attempt any answer to our argument of waiver is easily understood.

The facts neither created, nor were claimed to create, a new contract, as counsel asserts. They showed conclusively: (1) That the plaintiff was not called upon to do business in Wisconsin in order to perform its contract up to the time of defendant's breach; (2) that the plaintiff was not in fact engaged in business in Wisconsin; and (3) that the plaintiff's failure to do the acts described in the contract, which are claimed to constitute doing business in Wisconsin, cannot be complained of by defendant.

The cases cited by counsel only indicate that the acquisition of property or the maintenance of an agent within a state may be regarded as "doing business" with in that state. As the Diamond Glue Company had no property in Wisconsin, and maintained no agent there, these cases do not apply.

There is a half-hearted attempt to sustain the only breach claimed by the defendant in the correspondence, namely, the plaintiff's failure to sell the entire product of the factory as rapidly as it was produced at the prices fixed by the defendant. The contract specifies no time within which the glue was to be sold. Surely the plaintiff was permitted a reasonable time in view of the condition of the market; yet the defendant repudiated the contract within ninety days after the first glue was ready for shipment. Plaintiff's duty was to use its best efforts to sell this glue. As pointed out in our former brief (p. 11) these efforts were systematic and thorough, and were beginning to bear fruit when the defendant broke the contract. Plaintiff never claimed that it was under no obligation to sell this glue, but it explained again and again—and the explanation is sufficient —why it took time to place the product of a new factory upon the market in the proper way (Rec. p. 45).

There is no warrant in the record for counsel's statements to the contrary, or that the plaintiff claimed the right to use the product of the factory to manipulate sales. (Principal brief for defendant p. 25).

In view of these plain facts counsel's claim that the management and operation of the factory furnished the principal advantage of the contract to the defendant is remarkable, but need not be considered further.

Much is attempted to be made of the fact that the plaintiff was also acting as sales agent, under a similar contract, of the glue factory at Gowanda. The Diamond Glue Co. had no more interest in the Gowanda factory than it had in the United States Glue Company's factory. It was sales agent for both. It was asked to agree to sell only the product of defendant's factory, and it refused so to agree. (Rec. p. 33, 34, 75). Defendant knew that it had not thus agreed, and knew that it had a similar contract with Foerderer in Philadelphia and with Gaensslen-Fisher & Company, at Gowanda, before it made its contract of June 25th, 1898. (Exh. 2, Rec. p. 74). Counsel argue as though exclusive sales agent meant exclusive principal. It was necessary that the factor should control the entire product of the factory to protect it in the very large initial expenses incurred in placing the product on the market.* It was not necessary—it would be absurd—for a sales agent, having an established business as a large glue commission merchant, to restrict itself, as to a certain kind of glue, to the product of one factory, with no allowance for expenses, no control of prices and no guaranteed compensation. The competition between the product of this factory and the Gowanda factory was absolutely controlled by the principals who produced the commodity and fixed its price. Certainly upon this record there is no evidence of the breach of the contract by the plain-

* Defendant's answer even states that these expenses would have amounted to as much as the commissions to be paid. (Rec. p. 15).

tiff which would warrant a peremptory instruction in defendant's favor. (See further our original brief p. 100-102).

## II.

### Concerning the Questions of Law raised by the Briefs for Defendant in Error.

*First.* Is a statute, before it is in force, any part of the law of the state?

*Second.* Does the constitutional prohibition against the impairment of contracts apply only to contracts fully executed?

*First.* Was the Wisconsin statute, which by its terms did not go into effect until Sept. 1st, 1898, such a law of the State on June 25, 1898, that it entered into and formed a part of the contract made on that day?

To sustain the affirmative, counsel argue at length upon the validity of statutes controlling the coming of foreign corporations into a state, and recite the equally admitted and irrelevant history of the amendment of the act in question.

The original act, *which is the act pleaded*, it is now conceded, was "void as to natural persons residing in other states." (Principal brief p. 8). It is an unsupported assumption that this invalidity as to partnerships and voluntary associations did not infect the entire act. (See our brief, pp. 31-40). The recent case of the *Ashland Lumber Co.*, cited by counsel, (p. 7 of brief), does not touch

the question here. Neither the validity of the statute as originally passed, nor its application to a contract made before the statute was in force, was there considered or raised.

But admitting the validity of the act as an act, the question remains, can it be held to excuse the breach of a contract made before the statute was in force?

Counsel's argument is ingenious (pp. 11 to 17, Brief of Mr. Lines): the legislature passed the act in 1897; it then required the approval of the governor, publication, and a certification thereof by the judges of the Supreme Court; all these things had been done prior to the execution of the contract; therefore, *although the act itself provided that it should not go into force until Sept. 1st, 1898*, on June 25, 1898, it was a law which entered into the contract between the parties and therefore could not impair its obligations. (*Idem.* p. 16).

How could the act be more operative as to this contract than to invalidate it? How fatuous, against the express provision of the statute, the argument that the constitutional prohibition applied, not to the effective law, but to some step or steps in its creation. Counsel's industry has collected many cases in which language is used which he takes as indicating the approval of this doctrine; but in not one case was this question involved.

If this statute had life for any purpose after publication but prior to Sept. 1, 1898, it had precisely similar prenatal existence *before* publication but after its passage. Throughout both stages equally it was only a *foetal statute—in posse*—not a law. It might never become effective; no one could know until Sept. 1, 1898. Counsel's argument makes the law speak, *first*, from its passage; *second*, from its publication; and *third*, from its "going into force."

A law may be complete and finished upon its passage; but if it does not go into force until a specified day it cannot become a part of the law of the state until that day. The "notice" which counsel claims the act gives during the interim does not limit the freedom of contract which otherwise exists; at most it has been held to bear upon *the reasonableness of a change of remedy* as affecting the validity of the statute, and not upon the *existence of the change prior to the appointed date.*

The case of *Stine vs. Bennett*, 13 Minn., 138, 143, concerns the validity of a statute of limitations whose operation was postponed, as the court held, for the purpose of enabling suitors to bring their actions before it went into effect. However good that reasoning may be with regard to statutes of limitation, it has no application to ordinary statutes, where the rule is well settled that they speak from the time of their going into effect and not from the time of their passage. Thus in the case of *Commonwealth vs. Bennett*, 108 Mass., 30, 32, also cited by counsel, the Court said: (page 32)
"*A statute speaks from the time when it takes effect*, and a penalty "*already incurred*" is one incurred *at any time before the statute takes effect.*"

And even in regard to the statute of limitations the rule in *Stine vs Bennett* is by no means established. See Price vs Hopkins, 13 Mich., 318, where COOLEY, J., in a very forcible and well considered opinion, held directly the contrary. The other cases cited by counsel are not in point.

Counsel's argument makes this statute control this contract as completely as though the contract had been made after the statute was in force. Therefore it abolishes the difference, which the statute itself *creates and expresses*,

between being operative and not operative. The language quoted by counsel was used in cases in which the question raised here was not in view. They are wholly inapt. (See our brief, pp. 50-62).

Not only the weight of reason and authority pronounces a law no law *until it is in force*, but this was expressly held the law of Wisconsin in *State vs Messmore*, 14 Wis., 163 175, cited in our former brief at page 56; while counsel are forced to the conclusion (Mr. Lines' brief, p. 17) that a legislative act between the time of its passage and the time prescribed for going into effect has as full effectiveness against contracts made during that period as it has against contracts made after the act is "in force." It is not the making of the contract which renders a prior enactment invalid, but the action of a court, which, by giving such statute a retro-active effect, makes a new contract for the parties, or deprives one of them of the benefits which the contract gave when it was lawfully made.

This precise question was decided in an able opinion by the Supreme Court of Michigan in *Cargill vs. Power*, 1 Mich., 369, 370-2. The Michigan legislature passed an act in 1846 reducing the time of redemption from a mortgage sale from two years to one year. The act was part of the revised statutes which by their terms went into effect March 1st, 1847. In January 1847 the mortgage in question was executed, and a sale to foreclose it was made in July 1848. The question before the court was whether the period for redemption was two years or one year. The Court said (page 370):

"It is insisted that, as the mortgage was executed after the passage of the revised statutes but before they took effect, that the intention of the parties was that the proceeding under the power to sell should be regulated

and their rights governed by the provisions of the revised statutes.

"No statute has, *ex proprio vigore*, any force until it becomes the law of the land. All persons are bound to know what the law is; and as it is that which is to govern the actions and conduct of men, their contracts, it is to be presumed, are made in reference to it unless the contrary is shown.

* * * * * *

"With what propriety, then, can we say that the legal presumption is that their contract, in its very terms made in reference to the law, *was not made in reference to the law in force, but in reference to one which might never take effect?*"

The Court then held that under the law in force when the mortgage was made the mortgagor had the right to retain possession of the premisis for two years after the sale; and they say further concerning the impairment of contract obligations: (p. 372)

"The object of the constitutional provision, it was said in *Bronson vs. Kinzie*, 1 How. 311, was to maintain the integrity of contracts, and to secure their faithful execution throughout the Union,. The tendency and effect of the legislative provisions we have been considering are, to impair the integrity of this mortgage contract, and impose upon it an execution contrary to its meaning and the intention of the parties; and in my opinion we are in duty bound to pronounce them, so far forth, to be unconstitutional."

*Second.* CAN ANY EXECUTORY CONTRACT BE IMPAIRED BY A STATUTE ENACTED AFTER THE CONTRACT WAS MADE?

Counsel answer the question thus:

"Every executory contract of a corporation to transact business in a foreign state is conditioned as a matter of law upon the continuation of license from that state to come within its borders." (*Principal brief for defendant in error, p.* 11).

In other words, the constitutional protection belongs only to *executed* contracts. But no contract can ever in any controversy unless it is executory as to one party. And it is for the very purpose of compelling execution that the constitution prohibits a state from excusing performance,—from impairing the obligation through the enforcement of which alone a contract is ever *executed*.

This contract would have been as essentially executory in September, 1900, as it was on September 1st, 1898. The contract was an entirety. Its obligations could no more be lawfully changed by statute during the first year of its life than during the last. So far as the location, construction and equipment of the factory were concerned it *was executed*. And it is a significant fact in this connection that so far as it had been executed it was for the sole benefit of the defendant, and that the executory part alone was of advantage to the plaintiff. How idle to say that this statute, even if retroactive, did not impair the obligation of this contract. (Idem p. 16). Where, for the plaintiff, is "*juris vinculum*" when its contract becomes unenforceable for its benefit? This statute does not impair the obligation of the contract?—when the statute itself is defendant's excuse for non-performance of the contract—confessedly valid when made? When it is claimed the obligation is gone—the chain is broken—for want of an act not required of the plaintiff when the contract was made?

When counsel come to discuss the plaintiff's right to recover damages they forget this executory argument, and say (*Idem* p .26): "The contract is an entirety. The stipulation for planning and supervising the construction of a factory *are preliminary only and call for no compensation.* No compensation is considered except as it is to be derived from the last step—*sales of product*—and is measured by commissions thereon." And as to commissions already earned it is claimed there could be no recovery, because such claim would be for "compensation for an *executed* portion of a contract forbidden by law.*** "This part, if it alone were illegal, would so infect the whole contract and the right of recovery as to avoid the whole." (*Id.*, p 26). Forgetting that on a prior page they had argued that the inclusion of natural persons in this statute did *not* "avoid the whole."

The foreign corporation is not an outlaw. Its contracts are just as sacred as the contract of a natural person or of a domestic corporation. It is true that a state may admit corporations of other states to do business within its borders, or not, as it chooses; but it cannot admit them to do business there, to make contracts there, and then destroy the binding force of those contracts, or by imposing conditions or otherwise, deprive the foreign corporation of any part of their benefits. Because a corporation organized in Illinois has been making and performing a contract in Wisconsin, it has no right, against the will of Wisconsin, to go on making new contracts there; but it has the right, and it is its duty, to carry out those already made before its status was changed.

If the highest authority is needed to strengthen a position so clear upon principle, it is found in *Bedford vs. Eastern Building & Loan Association*, 181 U. S., 227, 240, 241.

The Loan Association was a corporation of New York, and through its regular agent in Tennessee issued its certificate of stock to Bedford, a resident of Tennessee, on February 2nd, 1891. This stock made Bedford a member, and entitled to all the benefits of members under the by-laws of the Association. One of these benefits was the right, upon certain terms and condtitions, to borrow money from the Association. On March 20th, 1891, Bedford applied for a preference in obtaining a loan upon real estate which he described. On March 26th, 1891, a law of Tennessee went into effect prohibiting foreign corporations from doing business in the state until they had filed certain papers in the office of the Secretary of State; and another act, effective on the same date, prohibited building and loan associations from doing business in the state until they had deposited certain securities in trust for the benefit of their members and creditors. On May 18th, Bedford's application for preference was allowed; and on June 20th, 1891, he applied for the loan. This application was accompanied by a mortgage duly executed, acknowledged and recorded, together with notes which it secured. On August 11, 1893, the loan association filed the papers required by the general act, but did not comply with the above building association laws in any respect. Bedford defaulted on his notes, and bill was filed to foreclose the mortgage. Bedford answered that the notes and mortgage were in violation of the above laws of Tennessee, and therefore were void. In a similar case the Supreme Court of Tennessee, in 1897, had decided that notes and mortgages executed under such circumstances were void.

This Court held, (on a certificate of Importance from the Court of Appeals for the Sixth Circuit), that the Statutes of Tennessee could not affect the right of the Loan Association to perform the contract, embodied in its certificate

of stock, which it had issued prior to the passage of the law, even though *the contract sought to be enforced was the contract evidenced by the notes and mortgage, which were executed after the laws in question were in full force and effect.* The Court said, at page 240:

"The Statutes of Tennessee, relied on as a defense, were passed March 26th, 1891, and the question is, did the subscription to the stock of the Association, its issuance and the application for a loan in pursuance of it, constitute a contract which was inviolable by the State legislature? We think the answer should be in the affirmative. By his subscription to the stock of the Association, Bedford became a member of the Association—bound to the performance of what its by-laws and charter required of him, and entitled *to exact the performance of what the by-laws and charter required of the Association.* Each acquired a right to what the other promised, and there were all the elements of a contract. We are compelled, therefore, to disagree with the views expressed by the Supreme Court of Tennessee in *New York, &c., Loan Association vs. Cannon*, 99 Tenn., 344."

And at page 241:

"It (the Loan Association) might indeed have the right to decline any condition and retire from the state, and from all it had the option to retire from. *But it could not retire from the execution of its contracts.* It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. *The state could not affect that obligation nor impair it.* 'The obligation of a contract is the law which binds the parties to perform their agreement.' (4 Wall., 452)."

Here is final answer to counsel's argument that "a State cannot be denuded of its sovereignty" by an execu-

tory contract. The Loan Association might make loans to Bedford (and afterward collect them) as long as he was entitled to them under its certificate of stock valid when issued.

Other questions are discussed by counsel, but they are of minor importance and are considered in our original brief. We respectfully submit that for the errors there indicated the judgment of the Circuit Court should be reversed and the cause remanded for a new trial.

EDGAR A. BANCROFT,
SAMUEL ADAMS,
*Of Counsel for Plaintiff in Error.*